BOONCHAI SOMPOLPONG

v.

CHUA KA SENG

HIGH COURT, SINGAPORE
LAI SIU CHIU JC
[SUIT NO. 978 OF 1982]
18 OCTOBER 1991

PARTNERSHIP: *Issue - To determine the partnership at will - Whether plaintiff an equity partner or whether the plaintiff only a salaried partner.*

EVIDENCE: *Only the parties to the proceedings gave evidence - No agreement in writing - The Partnership Act of 1890, s. 26(1).*

This was an application by the plaintiff for (a) an account of the debts and liabilities from the commencement of the practice from or about February 1979, until the date of dissolution (31 December 1981), and (b) a declaration that he was entitled to 20% share in the debts and other assets and property belonging to the practice.

The Defence (*inter alia*) denied the plaintiff's claim, asserting that the plaintiff was only a working or salaried partner; and that the aggregate monies paid to him would not exceed 20% of the net income of the firm (and) that the plaintiff neither had paid a premium for goodwill nor did he make contributions to the capital for the practice.

The Judge, as a finding of fact declared that, if the defendant's contention that the plaintiff was only a salaried partner or employee is true, there would be no necessity for the defendant to adjust either party's drawings/income such that the ratio 80% and 20% respectively in favour of the defendant and the plaintiff was maintained for 1979 and 1980, based on the premise that an employee receives his fixed salary, regardless of the fortunes or misfortunes of his employer.

The other main issue, that was dealt with by the Court, was on the issue whether or not the plaintiff is an equity partner. On the evidence, the Court preferred to rely on the plaintiff's version of the facts. Further on the basis of the evidence adduced, the Court made the reasonable inference that, the plaintiff and the defendant were the 2 partners of the practice and their contributions toward the share capital was in proportion of 80% and 20% infavour of the defendant and the plaintiff - respectively.

In the instant case on the question of whether a partnership exists and its nature thereof, ... s. 2 of the Partnership Act 1890, (the Act) was distinguished, and the Court took the view that the principle applicable to the determination of the existence and nature of a partnership hinges on the true intention of the parties..

[Also] where there is no agreement in writing, the intention of the parties must be ascertained from their words and conduct.

Held:

[1] The plaintiff was entitled pursuant to s. 26(1) of the said Act to determine the partnership at will (on the findings of fact) and that the relationship between the plaintiff and defendant created a true partnership.

[Judgment for the plaintiff.]

Case referred to:
Stekel v. Ellice [1973] 1 WLR 191 ***(dist)***

Legislation referred to:
Evidence Act (Cap 97) [Sing], ss. 34, 36
Partnership Act 1890 [UK], ss. 2, 2(3), 26(1)

For the plaintiff - Looi Kwok Peng
For the defendant - Cheng Tim Pin

JUDGMENT

Lai Siu Chiu JC:

The plaintiff, a Thai national and the defendant became acquainted during the years 1976-1978 when both were employed as architects in the firm of Raglan Squire & Partners (RSP). The defendant was considerably more senior to the plaintiff in terms of experience having nearly 7 years' service with RSP before he left the firm; the defendant had graduated from the University of Melbourne in 1965.

In April 1978, the defendant left RSP to set up his own practice in Maxwell House under the name and style of Chua Ka Seng Chartered Architects (the practice).

The plaintiff had worked in Singapore since June 1976, although it was only on 6 February 1978, (Exh. P3) that he became a registered architect in Singapore.

The plaintiff alleged that prior to his departure from RSP, the defendant confided in the plaintiff his (the defendant's) plans to set up his own firm and he sought the plaintiff's services as a designer. The plaintiff alleged that it was agreed he would assist the defendant, initially on a part-time basis and later on, he would leave RSP's services and join the defendant as a partner. The plaintiff asserted that in accordance with his agreement with the defendant, he assisted the defendant with design work from about April or May 1978, onwards by going to the defendant's office in the evenings and on weekends, spending on an average about 30 hours a week for about 8 months working part-time for the defendant. At $20 per hour, the plaintiff calculated that the total value of his part-time work for 8 months was $20,000.

In consideration of his services the defendant paid the plaintiff cash totalling $6,000 on 3 occasions and further gave to the plaintiff for the plaintiff's use his old Ford Cortina car (the car) No. E 4740 U valued at $8,000. The car was eventually sold off and the proceeds utilised to part-finance the purchase of a Q plate car for the plaintiff's use. Against the defendant's own uncertainty whether the car was transferred into the plaintiff's name, the plaintiff produced 2 letters from the Registry of Vehicles (Exhs. P1 and P2) which confirmed that ownership of the car was indeed transferred to the plaintiff.

In December 1978 the plaintiff took leave and visited New Zealand. He said that due to an air-strike, he overstayed his leave and upon his return to Singapore he found that RSP had terminated his services with one month's notice expiring on 6 January 1979 (Exh. P7). He testified that it had been his intention to resign from RSP in any event but he was unable to furnish any evidence in support thereof. The plaintiff said that he then went to see the defendant and they discussed the terms of their partnership. He alleged that it was agreed that the defendant would have 80% share of the earnings and assets of the practice whilst he would have the remaining 20% share. The plaintiff requested that the terms of the partnership be put into writing but the defendant said there was no necessity for a written agreement because the parties had a gentleman's agreement. The plaintiff said he also raised

the question of his contribution to the partnership capital and the defendant replied that it was unnecessary because the set-up of an architectural firm is such that not much capital is needed and in any case the plaintiff's services for the period he worked part-time would be considered as the plaintiff's contribution towards the capital. The plaintiff was told that to streamline the administration work, he would draw a fixed sum every month and the partnership accounts would be taken at the end of the year for the balance of the drawings due to each partner. It was further discussed that if the practice should lose money, the plaintiff's share of liability would be limited to 20% of the losses. It was agreed that the defendant would be responsible for financial matters, administration and clients' contacts whilst the plaintiff would take charge of design, production drawings and oversee ongoing projects.

In the income tax returns (Form P) of the practice submitted by the defendant in July 1981, for year of assessment 1980, the balance sheet and profit and loss accounts for 1979, (Exh. D4) showed the defendant's and plaintiff's capital contributions as $32,000 and $8,000 respectively *viz* in the proportions 80% to 20% whilst the share of profits was apportioned 80% and 19.99% in their respective favour.

The plaintiff testified that for 1978 and 1979, he drew a total sum of $34,200 from the practice as recorded at p. 189 (the entries) of the firm's salary book for 1978-1979 (Exh. D5). He was assessed tax by the Comptroller of Income Tax (the Comptroller) for the year of assessment 1980, (Exh. Dl) on income classified under the column 'Employment/Pension' of $29,200 based on his monthly drawing for 12 months of $2,200 ($24,200) plus an extra $5,000 paid to him for 1978. The difference of $5,000 between his total drawings of $34,200 and his income of $29,200 was the bonus or advance given to him around the time of the Chinese New Year in 1980, but meant for 1979.

As the plaintiff's 20% share of profits for 1979, was $14,709.48 against his drawings of $34,200, his excess drawings of $11,490.52 ($19,490.52 less capital contribution of $8,000) were debited to his account and carried forward to the balance sheet for the following year (1980) for year of assessment 1981 (PSB25).

The firm's salary book for 1980, (Exh. D6) at p. 195 showed that for 1980, the plaintiff drew a monthly sum of $2,500 or $30,000 for the whole year. He further took a monthly loan of $500 for 9 months totalling another $4,500. Added to the $5,000 bonus or advance which he received for 1980, in the following year (1981) around the time of Chinese New Year, the plaintiff received a total emolument of $39,500 for 1980. Based on his monthly drawings of $2,500 and his total income therefrom of $30,000 the plaintiff received from the Comptroller an assessment for year of assessment 1981, (Exh. D2) which he paid.

In the accounts (PSB16) submitted by the defendant in April 1982, under Form P to the Comptroller for year of assessment 1981, the firm's profits were apportioned $215,524.32 and $53,881.09 in favour of the defendant and plaintiff respectively in the ratio 79.99% to 20%. The plaintiff's excess drawings for the previous year of $19,490.52 were deducted from the said $53,881.09 to leave a balance of $34,390.57. As the plaintiff had received $39,500 (inclusive of $5,000 'bonus') from the practice for that year, his excess drawings of $5,109.43 ($39,500 less $34,390.57) were again debited to his account. There was however a change in the capital account structure of the parties. Unlike the previous year's balance sheet, the defendant's capital account now showed a figure of $40,000 an increase of $8,000 from the previous year whilst the plaintiff's capital account was nil and note 3 (see PSB24) to the accounts stated the following:

> In 1979, an entry was made whereby Mr. Boonchai Sompolpong was credited with $8,000 in the capital account. This $8,000 represented the value of a car belonging to Mr. Chua Ka Seng, and the car was placed for the use of Mr. Boonchai Sompolpong. The value of the car was never paid by Mr. Boonchai Sompolpong to either Mr. Chua Ka Seng or the firm. Accordingly the entry was reversed and adjustment made to correct the position.

On this note 3 the plaintiff's evidence was that the declaration had been made without his knowledge or agreement and the 1980, accounts had been prepared and submitted after he had given notice of dissolution to the defendant and after he had left the practice in December 1981. He alleged that the defendant had re-arranged the capital account to the defendant's own advantage and the defendant had never discussed with him the deletion of the plaintiff's share capital of $8,000.

The defendant's evidence was that the credit to the plaintiff's account in the 1979, balance sheet (Exh. D4) had been a genuine mistake on the part of his accountant. The accountant thought that the plaintiff had paid $8,000 for the car. The defendant said he also did not realise the accountant's mistake in the 1979 accounts until the 1980 accounts were prepared and when the defendant explained that the plaintiff had never paid for the car which ownership he said remained with him, the accountant reversed the entry on the $8,000. Given that the correction could have been done at any time between 1979, and before the plaintiff's departure from the partnership in December 1981, and given that the correction was done only after the plaintiff had left the firm and after the plaintiff had commenced this suit (by which time the parties' relationship had soured) I cannot accept the defendant's explanation for removing the plaintiff's share contribution of $8,000. It was only when Counsel for the plaintiff produced Exhs. P1 and P2 to prove that the car's ownership had been transferred to the plaintiff that the defendant conceded that the car had indeed been transferred to the plaintiff and he explained that it was for the purpose of traffic offences so that whoever actually used the car more often should be responsible for traffic offences. It is noteworthy in this connection that the plaintiff's evidence that the car was eventually sold off and replaced by a Q plate car purchased for his use was never challenged by the defendant. That being the case the $8,000 capital contribution of the plaintiff (which I accept) was converted into another asset for the partnership. It is equally noteworthy that the accountant who prepared the 1980, accounts was not called to give evidence to explain the same in particular note 3 and all that the defendant said about the accountant's absence was that 'he is overseas' with no further explanation as to who the accountant is and whether his being abroad was temporary or permanent in nature. I accept in this connection the submission of Counsel for the plaintiff that capital contribution need not always be in cash but can be in some other form, including services.

Reverting to the plaintiff's evidence, he testified that in the first week of December 1981, he told the defendant he wanted to dissolve the partnership and he asked that the partnership accounts be taken; the defendant agreed. He requested the defendant to notify all the clients and that the partnership's projects should be divided between them. The defendant wrote several letters all dated 29 December 1981 to certain clients (DB14-19) to say the practice ,had no objections to their appointing the plaintiff as architect for their projects. The plaintiff complained that the projects which the defendant passed to him were those near completion for which minimal fees could be collected. This was denied by the defendant. The plaintiff further alleged that it was never agreed that after the projects of the practice had been distributed between the parties that he would have no further claims against the defendant as contended in ,the further amended defence.

On 24 December 1981 (DB9-10) the plaintiff's then solicitors wrote to the defendant (which letter was hand-delivered) giving notice of the plaintiff's withdrawal from the practice with effect from 31 December 1981 and requesting inspection of all the books and accounts of the practice. The letter indicated that the plaintiff was amenable to any suggestion the defendant may have in respect of the distribution of the existing projects of the practice.

The defendant's reply through his solicitors to DB9-10 on 26 December 1981 (DB11) *inter alia* asserted that the plaintiff was only a salaried partner, the plaintiff was therefore not entitled to dissolve the practice and he was not entitled to accounts or inspection of the books.

Notwithstanding the stand taken by the defendant in DB11, the plaintiff had eight of the draft partnership accounts for 1981, on 14 January 1982 in the defendant's office in the presence of the firm's accountant. The plaintiff testified that he had on many occasions requested the defendant for the partnership's accounts and the defendant always put him off usually with the excuse that the accounts were not ready. He testified that apart from the 14 January 1982 meeting at which he sighted the 1979 accounts (Exh. D4) and was shown draft accounts in pencil for 1981, the defendant had never given him a copy of any accounts. It was in 1984, that he applied to and managed to obtain from, the Comptroller the accounts of the practice for 1979 and 1980. He was however denied access by the Comptroller to the 1981 accounts on the ground that he was no longer a partner. He further testified that apart from the assessment notices which the Comptroller served on him based on Form P submitted by the defendant to the income tax department, he had never filed his personal income tax returns nor did he ever receive any IR8A Form from the practice.

The Claim

On 10 March 1982, the plaintiff filed his suit and by his amended statement of claim he prayed for:

(a) an account of the debts and liabilities from the commencement of the practice from or about February 1979, until the date of dissolution (31 December 1981), and
(b) a declaration that he was entitled to 20% share in the debts and other assets and property belonging to the practice.

The further amended defence denied the plaintiff's claim asserting that the plaintiff was only a working or salaried partner, he was paid fixed monthly salaries which were periodically increased from $2,200 to $2,800 per month, he was given loans and bonuses at the defendant's discretion such that the aggregate of his annual salary and bonus would not exceed 20% of the net income of the firm, he had neither paid a premium for goodwill nor did he contribute to the capital for the practice. The defendant denied that the practice was dissolved on 31 December 1981, as the plaintiff had tendered his resignation on or about 4 December 1981, which he had accepted. The defendant further contended that on the transfer to the plaintiff of projects of certain clients of the practice at the plaintiff's request, the plaintiff would have no further claims against the defendant or the practice. However if the plaintiff was entitled to 20% of the net profits of the practice for the years 1979-1981 then the sum due to the plaintiff was $11,743.10, pursuant to the accounts shown by the defendant to the plaintiff on 14 January 1982.

The Issue

The only issue for determination is whether the plaintiff was an equity partner of the practice as he contended or whether he was only a salaried partner as the defendant contended.

The Findings

Only the parties to the proceedings gave evidence. I have already referred to the plaintiff's (PW1's) evidence. As for the defendant's (DW1's) evidence, in the main he said that it was never his intention to and he never promised the plaintiff any equity partnership, quite simply because he could not afford to have a partner when he first started the practice. In any event the plaintiff was very junior at the time, in the defendant's words the plaintiff 'was still very immature and green'. The defendant testified that when he first started the practice, he knew he had to struggle for a minimum of 6 months to 1 year before he could establish himself and for that reason alone he would not have offered partnership to anyone because he had to worry about his day to day income. He said he started off with only 1 employee, a relative by the name of Chua Tong Hwee (Chua) who he intended to train as a draughtsman. The defendant denied that the plaintiff had commenced working part-time for him from the time he commenced the practice *viz* April 1978 and in support of his contention he relied on the entries which showed that the practice only commenced paying the plaintiff in October 1978. On this aspect of the evidence the plaintiff had pointed out that there was a pencil asterisk against the month of May in the entries and he thought it was significant in that it was around May 1978, that he commenced working for the defendant. When questioned on the asterisk, the defendant said it had no particular significance and it could be an indication of the starting point of the practice. Counsel for the plaintiff in cross-examining the defendant produced 4 photographs which showed both the plaintiff and the defendant in 2 of them and which photographs the defendant agreed were taken at the time the office of the practice (then at the third floor of Maxwell House) was being renovated and outfitted. Counsel for the defendant did not challenge the authencity of the photographs or their negatives (which were also produced). Instead Cheng in his cross-examination relied on the entries as evidence that the plaintiff only commenced working for the defendant in October 1978. The plaintiff's explanation for the entries was that because of the firm's financial position, his first recorded drawing of $800 was in October 1978, but he started working part-time much earlier some time around April or May.

Before I make my findings as to which version of the evidence I accept, I would refer to the defendant's evidence on questions put to him by the Court regarding the payment of rent for the office premises when he first commenced the practice. He had said that because he knew the developer of Maxwell House fairly well, the latter allowed him to owe the arrears of rent for may be 6 months, probably no doubt due to the then financial constraints of the practice.

If the defendant could not manage to service the monthly rent and service charge for the office premises initially, I believe it is equally likely that he was not able to pay for the plaintiff's part-time service from its commencement.

A careful perusal of Exh. D5 further shows that the defendant whilst he may well have started the practice with only 1 full-time employee in the person of Chua Tong Hwee, did engage a number of staff on a part-time basis including by his own evidence 2 staff from RSP *viz.* Alfred Yeo Kim Pui and Ow Kuan Seng. Alfred Yeo was employed as a senior draughtsman at a starting salary of $1,100. The plaintiff was the only architect of all the part-time staff engaged. Bearing in mind the plaintiff's evidence as to the division of functions between the parties and which was not disputed by the defendant, and the financial straits of the practice in its initial stages, I accept the plaintiff's evidence that the defendant only commenced paying for his part-time service very much later. If the defendant could afford to pay for the part-time services of M/s. Yeo and Ow from the commencement of the practice

(in fact Ow was employed on 12 March 1978) and he employed Yeo full-time at a starting salary of $1,100 from 24 July 1978 onwards, I believe it was similarly well within his then limited means to have engaged the plaintiff's part-time services from the beginning.

As for the asterisk against the month of May in the entries, I cannot accept the defendant's explanation that it has no particular significance and that it merely indicated when he commenced the practice since the entries pertained only to the plaintiff. Ow for example was noted to have been employed (albeit part-time) even before the defendant officially commenced the practice on or about 2 April 1978. The defendant had testified that Exh. D5 comprised 2 sections, the first section comprised staff engaged on a full-time basis and the other section comprised part-time staff. The plaintiff along with M/s. Yeo and Ow had their particulars recorded in the part-time section and this is consistent with the evidence of the plaintiff.

Counsel for the defendant made much of the fact that the plaintiff was dismissed from his employment with RSP. It would be unfair to draw an adverse inference against the plaintiff for the simple reason that RSP's letter of termination (Exh. P7) gave no reasons for the termination and it was the plaintiff who volunteered the information to the defendant that he had been dismissed for over-staying his leave. It could be, and I would not wish to further indulge in such speculation, the plaintiff's working for the defendant on a part-time basis may have been the cause for RSP to dismiss him to register the firm's disapproval. It is to be noted, that by December 1978, Alfred Yeo had left the services of RSP to join the practice a fact which would not be unknown to RSP, given the smallness of the profession. The defendant had himself testified that RSP was rather sensitive that he would take away some of their jobs and clients when he left the firm. I am certain RSP's sentiments would extend to their staff as well.

It is also noteworthy that despite the defendant's reservations on the plaintiff's inexperience that the founder of RSP *viz* Mr. Raglan Squire himself had written to the plaintiff in June 1977, (Exh. P6) complimenting the plaintiff on his plans for the Clementi Park Condominium of City Development upon which the said developers also gave a testimonial dated 5 June 1980 (Exh. P5). The fact that a person may be inexperienced cannot be equated with a lack of talent on his part.

Counsel for the defendant relied on 2 other documents to prove that the plaintiff was only a salaried partner, *viz.* the defendant's application to Hongkong and Shanghai Bank (DB-2) to open an account for the practice and the plaintiff's income tax assessments for the years 1980-1982 (Exhs. Dl, D2 and D3). The defendant in DB-2 had stated that he was the sole proprietor of the firm 'there being no other person interested as partner or co-proprietor in the business'. In Exhs. Dl to D3 the Comptroller had classified the plaintiff's income under the column 'Employment/Pension' and not under the column 'Trade'. It was rightly pointed out by Counsel for the plaintiff that DB-2 was a standard printed form supplied by Hongkong Bank. Similarly Exhs. Dl to D3 are standard forms issued by the Comptroller and one cannot without evidence being adduced from the income tax department, read too much into the manner whereby the Comptroller classifies a taxpayer's income. One cannot rule out the possibility of error on the Comptroller's part. The defendant never disputed the plaintiff's evidence that he never showed the plaintiff the accounts of the practice despite the plaintiff's repeated requests. It had been agreed according to the plaintiff's evidence that the defendant would take charge of financial matters. Further it is not a requirement in opening bank accounts of partnerships that each and every partner must be a signatory to the accounts nor that all partners must append their signatures to the application forms for opening such accounts.

Turning to another aspect of the defendant's evidence, he had stated that he paid bonus at his discretion such that the plaintiff's total emoluments in any one year inclusive of bonus and salary did not exceed 20%. This was confirmed by Exhs. D4, D5 and D6. As stated earlier the plaintiff's excess drawings of $11,490.52 for 1979 were carried forward to the following year (1980). The process was repeated for the plaintiff's 1980 income. If the defendant's contention that the plaintiff was only a salaried partner or employee is true, there would be no necessity for the defendant to adjust either party's drawings/income such that the ratio 80% and 20% respectively in favour of the defendant and the plaintiff was maintained for 1979 and 1980, based on the premise that an employee receives his fixed salary, regardless of the fortunes or misfortunes of his employer. On that basis alone, the plaintiff has made out his case that he is at entitled to at least 20% share of the profits of the practice for 1981, after taking into account his drawings totalling $33,600 for that year. He had been led by the defendant's conduct to believe that the computation of the preceding 2 years would continue to apply and that he would receive 20% of the net profits of the firm.

On the issue whether the plaintiff is an equity partner, I find on the evidence that I prefer the plaintiff's version of the facts. I do not accept the defendant's evidence that he employed the plaintiff because the latter needed a job after being dismissed by RSP. However generous the defendant may have been, I cannot imagine that he would offer employment to the plaintiff out of sheer sympathy. He must have realized the plaintiff's potential and abilities no doubt based on the plaintiff's earlier part-time service with him.

The plaintiff gave evidence in a forthright manner and no part of his evidence was discredited under cross-examination. He himself admitted with remarkable candour that the passage of time may well have affected his recollection of events and even then, no criticism of his evidence can be made on that score. I have already alluded to several inconsistencies in the defendant's evidence and at the risk of repeating myself I prefer the plaintiff's evidence.

I now turn to the law. On the accounts, *viz* Exh. D4, by virtue of s. 34 of the Evidence Act Cap. 97 read with s. 36 thereof, I find that the accounts signed by the defendant as the precedent partner of the practice are relevant and the accounts represent the state of affairs in the practice as at 31 December 1979. The only reasonable inference that can be drawn from Exh. D4 is that the plaintiff and the defendant were the 2 partners of the practice and that their contributions to the share capital of S40,000 was in the proportion 80% and 20% in favour of the defendant and the plaintiff respectively. If the plaintiff was only a salaried partner or employee as the defendant contends, then he should have had his earnings included in the column 'Staffs' Salaries Wages & Bonus' for the Profit and Loss Account for that year. It is also noteworthy that for the 1980 accounts (which were prepared and submitted to the income tax department in April 1982, after the plaintiff had left the practice) that in contrast to Exh. D4, the words used to describe both the defendant's and the plaintiff's earnings from the practice were categorised as Salary & Bonus (PSB-25) instead of as Drawings. Consequently the arguments of Counsel for the defendant that the 1980 accounts show the true state of affairs does not advance his client's case much further, given my earlier finding that the restructuring of the capital account and the deletion of the plaintiff's share capital of $8,000 was a deliberate manoeuvre on the part of the defendant for reasons already stated.

A partnership is not a person in law and unlike a company it is not a separate assessable entity for tax purposes. Partners therefore are individually and separately assessed on their respective share of income from the partnership. In this case the plaintiff was assessed individually on his earnings from the practice (Exhs. D1, D2 and D3). He denied he had ever

submitted his own tax returns to the Comptroller. No evidence was produced by the defendant to contradict the plaintiff's contentions. In any event whether the plaintiff did or did not submit his own tax-returns has no relevance to the issue in this case. I may add that the Comptroller's representative who was present in Court on the first day of the hearing could have been but was not questioned by the defendant's Counsel on this point.

Whether a partnership exists and its nature thereof is a question of fact dependant upon the circumstances of each case. Section 2 of the Partnership Act 1890, (the Act) sets out the rules for determining the existence of a partnership in which regard, Counsel for the defendant drew my attention to subsection (3) thereof which states:

> '...The receipt by a person of a share of the profits of a business is *prima facie* evidence that he is a partner in the business but receipt of such a share, or of a payment contingent on or varying with the profits of a business, does not of itself make him a partner in the business...'

In reality s. 2 of the said Act affords little assistance and ultimately the determination of the existence and nature of a partnership hinges on the true intention of the parties. Where there is no agreement in writing as in this case, the intention of the parties must be ascertained from their words and conduct.

Counsel for the defendant drew the Court's attention to the case of *Stekel v Ellice* [1973] 1 WLR 191 and to the judgment of Megarry J at p. 198 where it was stated:

> ... salaried partner' is not a term of art, and to some extent it may be said to be a contradiction in terms. However, it is a convenient expression which is widely used to denote a person who is held out to the world as being a partner, with his name appearing as partner on the notepaper of the firm and so on. At the same time, he receives a salary as remuneration, rather than a share of the profits, though he may, in addition to his salary, receive some bonus or other sum of money dependent upon the profits. Quoad the outside world it often will matter little whether a man is a full partner or a salaried partner; for a salaried partner is held out as being a partner, and the partners will be liable for his acts accordingly. But within the partnership it may be important to know whether a salaried partner is truly to be classified as a mere employee, or as a partner...

The facts in *Stekel v. Ellice* were far different from the facts in this case as there, the parties had a written agreement dated 1 October 1968, whereby the plaintiff became a salaried partner of the defendant's accounting practice and the Court had to determine whether an alleged subsequent agreement which superseded the 1968 agreement made the plaintiff a full partner.

In this case there is no written agreement at all. The parties here have a partnership at will and one is left to determine the nature of such a partnership at will from the conduct of the parties. Another passage from Megarry J's judgment in *Stekel v Ellice* may be helpful and this is at p. 199 where he said:

> It seems to me impossible to say that as a matter of law a salaried partner is or is not necessarily a partner in the true sense. He may or may not be a partner, depending on the facts. What must be done, I think, is to look at the substance of the relationship between the parties, and there is ample authority for saying that the question whether or not there is a partnership depends on what the true relationship is, and not on any mere label attached to that relationship. A relationship that is plainly not a partnership is no more made into a partnership by calling it one than a relationship which is plainly a partnership is prevented from being one by a clause negativing partnership.

And at p. 200 Megarry J said:

> ... so I think that there could well be cases in which a salaried partner will be a true partner even though he would not benefit from s. 39 (the said Act). It may be that most salaried partners are persons whose only title to partnership is that they are held out as being partners; but even if 'salaried partners' who are true partners, though at a salary, are in the minority, that does not mean that they are non-existent ...

I am satisfied on the facts of this case that the relationship between the plaintiff and the defendant created a true partnership the defendant being the senior partner holding the lion's share of 80%. My finding means that the plaintiff was entitled pursuant to s. 26(1) of the said Act to determine the partnership at will on giving notice to the defendant of his intention to do so and which he did by his solicitors' letter dated 24 December 1981 (DB9-10).

There will therefore be judgment for the plaintiff as follows:

(a) a declaration that the plaintiff is entitled to 20% share in the debts due and owing to, and other assets belonging to the partnership;

(b) (i) that the Registrar be directed to take an account of the partnership's profits debts and other assets and liabilities for the period 1 February 1979 to 31 December 1981 and in the taking of the said accounts the plaintiff is to give credit for all monies drawn out by him on account of his share of the profits of the partnership;

(ii) in the taking of such accounts, the accounts of the practice as at 31 December 1979 (being Exh. D4 produced at the trial) are deemed settled accounts and ought not to be disturbed;

(iii) the defendant shall give to the plaintiff access on demand to all books vouchers and other documents in his possession or power or in the possession or power of his servants or agents relating to the said accounts.

(c) that the defendant do pay to the plaintiff the sums found due on the taking of the said accounts, and

(d) that the costs of this action and the costs of the taking of the said accounts are to be taxed and be paid by the defendant to the plaintiff.

Also found at [1992] 1 CLJ 561